

April 15, 2014

William B. Connors
Office of the City Attorney
91 Ashfield Road
Atherton, CA 94027

Re: Your Request for Informal Assistance
Our File No. I-14-054

Dear Mr. Connors:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Because you seek general information and have not provided information regarding any specific governmental decision, we are providing informal assistance.² Nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented; the Fair Political Practices Commission (the "Commission") does not act as the finder of fact. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

Are members of Atherton's Civic Center Advisory Committee subject to the Act's conflict-of-interest provisions?

CONCLUSION

The Civic Center Advisory Committee does not currently have decisionmaking authority. Therefore, the Act's conflict-of-interests provisions do not apply to its members. However, we caution that members of the committee will be subject to the conflict-of-interest provisions if the committee gains decisionmaking authority as analyzed below.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

FACTS

The Town of Atherton has established a committee to act in an advisory capacity to the Atherton City Council (the “City Council”) regarding the creation of a new civic center to include administrative offices, police department offices, public works and planning department offices, community meeting rooms, replacement for an existing library, and resulting parking in the general area where these uses currently exist. The committee is titled the Civic Center Advisory Committee (the “CCAC”) and includes two non-voting council members and seven citizens to act as voting members.

The CCAC does not take final action on matters before them, but it does make recommendations to the City Council. The CCAC is a Brown Act compliant entity, and it is not disputed that the actions of the committee constitute government decisions. However, you are unsure whether or not members are “public officials” for purposes of the Act and the Act’s conflict-of-interest provisions. The CCAC is charged with acting in an advisory capacity to:

“a. Assist staff in the development of a master planning process to determine the key issues that need to be addressed by the community as well as a process for keeping the community at large informed and involved.

“b. Work with staff to solicit feedback through tools such as surveys, community gatherings, and workshops to disseminate information regarding the key issues and questions involved in the development of a Master Plan for the proposed new Civic Center.

“c. Engage in public outreach to solicit substantive feedback and opinions on the Master Plan and the Civic Center project and provide Council with a summary of findings for consideration. Support staff with updates for the Town website and periodic updates for residents.

“d. The CCAC may form Ad Hoc Subcommittees and/or host community workshops to involve a broader base of residents for the purposes of information gathering on specific issues, thus creating more community involvement and more in-depth visioning.

“e. Once the Council adopts a Master Plan, the CCAC will continue to work with staff to coordinate public outreach and collect resident input during the design phase of the Community Center project.

“f. Assist in discussion about the short-term improvements needed for the Library and Town Center facilities.”

The City Council has solicited membership from the community to fill the public member spots on the CCAC and has intentionally attempted to include representation from

diverse locations in the community. The City Council has specifically attempted to include a member from the neighborhood close to the project as there will be a greater impact from the new civic center development. However, the potential member who has been identified resides approximately 475 feet from the project area. Accordingly, there is a concern that the potential member will be automatically disqualified from taking part in recommendations by the CCAC under the Act's 500 foot rule for interest in real property.

For purposes of determining whether or not the CCAC is an advisory body, you note that the CCAC was created by action of the City Council on February 12, 2013, and has met almost every month since inception. In this time, the CCAC has made only one recommendation to the City Council regarding the selection of a consultant to create the Master Plan. The City Council ultimately agreed with the suggestion and retained the consultant.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. A conflict of interest exists whenever a public official makes, participates in or uses his or her official position to influence a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her interests as specified by Section 87103.

The threshold question in determining if the members of the CCAC are subject to the Act's conflict-of-interest provisions is whether the members are "public officials." For purposes of the Act, Section 82048 defines "public official" as every member, officer, employee or consultant of a state or local government agency. The term is further defined by Regulation 18701(a)(1), which states:

"(a) For purposes of Government Code section 82048, which defines 'public official,' and Government Code section 82019, which defines 'designated employee,' the following definitions apply:

"(1) 'Member' shall include, but not be limited to, salaried or unsalaried members of committees, boards or commissions with decisionmaking authority.

"(A) A committee, board or commission possesses decisionmaking authority whenever:

"(i) It may make a final governmental decision;

“(ii) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden; or

“(iii) It makes substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.

“(B) A committee, board, or commission does not possess decisionmaking authority under subsection (a)(1)(A)(i) of this regulation if it is formed for the sole purpose of researching a topic and preparing a report or recommendation for submission to another governmental body that has final decisionmaking authority.”

Thus, a committee, board or commission is deemed to have decisionmaking authority if it (1) makes a final decision, (2) can compel or prevent a decision, or (3) makes substantive recommendations that are regularly approved without significant amendment or modification. If the CCAC has decisionmaking authority under any of these tests, its members would be considered public officials and are subject to the Act’s conflict-of-interest provisions. Alternatively, if the CCAC does not have decisionmaking authority, its members are not considered public officials under the Act and are not subject to the Act’s conflict-of-interest provisions solely by virtue of their membership on the CCAC.

Based upon the facts provided, the CCAC was established to help identify key issues during the planning and design of Atherton’s new civic center and to bolster public participation in the process. Most significantly, you have stated that the CCAC does not take final action on matters before them, but merely makes recommendations to the City Council for the council’s consideration. Moreover, there is no indication that the CCAC can compel or prevent any governmental decision. The only pertinent question is whether the CCAC has or will make substantive recommendations regularly approved by the City Council without significant amendment or modification.

You have stated that the CCAC has made just one recommendation to the City Council since its inception. While this recommendation was accepted, a single instance does not establish a record of regularly approved recommendations. Previously, we have “advised new advisory bodies that they are in fact solely advisory until a history of recommendations has been established.” (*Simon* Advice Letter, No. I-04-014, citing *Traverso* Advice Letter, No. I-01-124 and *Ball* Advice Letter, No. I-89-671.) Without a history of recommendations being accepted by the City Council, the CCAC is solely an advisory committee with no decisionmaking authority and, at this time, its members are not public officials subject to the Act.

Nonetheless, we must caution that members of the CCAC may become public officials at a later date. If the CCAC’s recommendations begin being regularly approved by the City

Council, you will ultimately need to revisit the issue of whether the CCAC may have decisionmaking authority.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl